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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

8 UNITED STATES OF AMERICA,

Case No. 2:09-cr-00222-HDM-PAL

9 Plaintiff,

10 ORDER

11 v.

12 ANTHONY SWANSON,

13 Defendant.

14 Defendant Anthony Swanson has filed a motion for
15 compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). (ECF
16 No. 209). The government has opposed (ECF No. 211), and Swanson
17 has replied (ECF No. 212).

18 Following a jury trial in May 2010, Swanson was found guilty
19 of one count of felon in possession of a firearm in violation of
20 18 U.S.C. § 922(g), two counts of possession with intent to
21 distribute cocaine base in excess of 5 grams in violation of 21
22 U.S.C. § 841(b)(1)(B), and one count of use of a firearm in
23 connection with a drug trafficking crime in violation of 18 U.S.C.
24 § 924(c). Swanson was sentenced to 360 months on the drug counts,
25 concurrent to a 120-month term for the § 922(g) conviction and
26 subject to a mandatory consecutive term of 60 months for the
27 § 924(c) offense, for an aggregate sentence of 420 months.

1 On May 20, 2020, the court granted Swanson's motion for
 2 reduction of sentence pursuant to the First Step Act of 2018, Pub.
 3 L. No. 115-391, 132 Stat. 5194 (2018). (ECF No. 207). An amended
 4 judgment of conviction was entered, sentencing Swanson to 262
 5 months on the drug counts, concurrent to a 120-month term for the
 6 § 922(g) conviction and subject to a mandatory consecutive term of
 7 60 months for the § 924(c) offense, for an aggregate sentence of
 8 322 months. (ECF No. 208).

9 Having served about 133 months of his sentence,¹ Swanson now
 10 seeks compassionate release.

11 **Standard**

12 18 U.S.C. § 3582(c)(1)(A) provides in relevant part:

13 [T]he court, . . . upon motion of the defendant after
 14 the defendant has fully exhausted all administrative
 15 rights to appeal a failure of the Bureau of Prisons to
 16 bring a motion on the defendant's behalf or the lapse of
 17 30 days from the receipt of such a request by the warden
 18 of the defendant's facility, whichever is earlier, may
 19 reduce the term of imprisonment (and may impose a term
 20 of probation or supervised release with or without
 21 conditions that does not exceed the unserved portion of
 22 the original term of imprisonment), after considering
 23 the factors set forth in section 3553(a) to the extent
 24 that they are applicable, if it finds that--

25 (i) extraordinary and compelling reasons warrant such a
 26 reduction;

27 . . .

28 and that such a reduction is consistent with applicable
 29 policy statements issued by the Sentencing Commission.²

24 ¹ Swanson's current projected release date is not known. As of today's
 25 date, the BOP inmate locator reflects a projected release date of April
 26 12, 2039, but this does not appear to account for the recent reduction
 27 in Swanson's sentence. See <https://www.bop.gov/inmateloc/> (last accessed
 28 Aug. 19, 2020).

2 ² In addition to "extraordinary and compelling reasons," the court may
 2 grant a motion if "the defendant is at least 70 years of age, has served
 2 at least 30 years in prison, pursuant to a sentence imposed under section

1 U.S.S.G. § 1B1.13 provides:

2 Upon motion of the Director of the Bureau of Prisons
3 under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a
4 term of imprisonment (and may impose a term of supervised
5 release with or without conditions that does not exceed
6 the unserved portion of the original term of
imprisonment) if, after considering the factors set
forth in 18 U.S.C. § 3553(a), to the extent that they
are applicable, the court determines that-

7 (1)(A) extraordinary and compelling reasons warrant
the reduction;

8 . . .

9 (2) the defendant is not a danger to the safety of
any other person or to the community, as provided in 18
10 U.S.C. § 3142(g); and

11 (3) the reduction is consistent with this policy
statement.

12 U.S.S.G. § 1B1.13.

13 Even if there are extraordinary and compelling reasons, an
14 inmate may be granted compassionate release only if he is not a
15 danger to any other person or to the community, as provided in 18
16 U.S.C. § 3142(g). *United States v. Johnson*, 2020 WL 2114357, at *1
17 (E.D. Wash. May 4, 2020) ("[T]he Court should not grant a sentence
18 reduction if the defendant poses a risk of danger to the community,
19 as defined in the Bail Reform Act.").

20 The defendant is not entitled to be present for a hearing on
21 a motion for compassionate release. See Fed. R. Crim. P. 43(b)(4).

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3559(c), for the offense or offenses for which the defendant is currently
imprisoned, and a determination has been made by the Director of the
Bureau of Prisons that the defendant is not a danger to the safety of
any other person or the community, as provided under section 3142(g)." 18
U.S.C. § 3582(c)(1)(A)(ii). Because Swanson is not over 70 years of
age and has not served more than thirty years in prison, this provision
does not apply.

1 **Analysis**

2 Swanson argues that there exist extraordinary and compelling
3 reasons for his release because his underlying health conditions
4 put him at an increased risk of COVID-19 complications. Specifically,
5 Swanson asserts that he suffers from hypertension, obesity, shortness of breath and cerebrovascular disease, all of
6 which are risk factors for severe COVID-19 outcomes. The government
7 opposes, arguing first that Swanson had not exhausted his
8 institutional remedies before filing the motion. Second, while
9 conceding that Swanson's obesity does place him at greater risk of
10 COVID-19 complications, the government asserts that a reduction of
11 sentence is nevertheless inappropriate when considering, as the
12 court must, the factors under 18 U.S.C. § 3553(a).

14 **A. Exhaustion**

15 Before a defendant may file a § 3582(c)(1)(A) motion, he must
16 ask the warden of his institution to file a motion for
17 compassionate release on his behalf and either (1) exhaust any
18 administrative appeals of the warden's refusal to bring a motion
19 or (2) wait thirty days from the warden's receipt of the request,
20 whichever is earlier.

21 Swanson submitted a request for compassionate release on May
22 28, 2020, that did not identify any basis for compassionate
23 release. On June 3, 2020, Swanson provided additional information,
24 arguing that he should be released due to the personal health risks
25 the COVID-19 epidemic was posing, but he did not specify any
26 condition he had that would put him at elevated risk of
27 complications. (ECF No. 212-1). On July 7, 2020, Swanson's counsel
28 also supplemented Swanson's request with additional information,

1 including the specific medical conditions Swanson believed put him
2 at greater risk of COVID-19 complications or death. (ECF No. 209-
3 2). The warden denied Swanson's request on July 13, 2020. (ECF No.
4 212-2).

5 Even assuming that Swanson's initial request, which did not
6 identify any basis for compassionate release, was insufficient,
7 his supplement and the supplement of counsel were sufficient to
8 present the warden with a request for compassionate release. More
9 than thirty days have elapsed from the warden's receipt of the
10 request and its supplements, so Swanson's motion is exhausted.

11 **B. Extraordinary and Compelling Reasons**

12 Section 1B1.13 sets forth specific examples of "extraordinary
13 and compelling reasons," including in relevant part that the
14 defendant is "suffering from a serious physical or medical
15 condition . . . that substantially diminishes the ability of the
16 defendant to provide self-care within the environment of a
17 correctional facility and from which he or she is not expected to
18 recover." U.S.S.G. § 1B1.13 app. n.(1)(A)(ii)(I). There is also a
19 catch-all provision, which provides: "As determined by the
20 Director of the Bureau of Prisons, there exists in the defendant's
21 case an extraordinary and compelling reason other than, or in
22 combination with, the reasons described in subdivisions (A)
23 through (C)." *Id.* app. n.(1)(D).

24 There is no doubt that Swanson's conditions, separately and
25 together, put him at a higher risk of COVID-19 complications under
26 the CDC guidance. The government in fact concedes that Swanson's
27 obesity alone puts him at higher risk of complications, even while
28 suggesting that his other conditions do not. However, there is

1 little to indicate that COVID-19 is spreading rapidly in Swanson's
2 institution, USP Leavenworth.³ For this reason, the court is not
3 persuaded that extraordinary and compelling reasons exist for
4 Swanson's release. But even if they did exist, the court would
5 nevertheless decline to reduce Swanson's sentence after weighing
6 the applicable 18 U.S.C. § 3553(a) factors.

7 **C. 18 U.S.C. § 3553(a) Factors**

8 Both the nature and circumstances of the offense in this case
9 and the history and characteristics of the defendant weigh against
10 shortening Swanson's sentence any further. The offense conduct
11 involved both controlled substances and firearms. Before
12 committing the offense conduct, Swanson had a substantial criminal
13 history that qualified him as a career criminal and that included
14 several drug trafficking offenses, intimidation of a public
15 officer, and several other arrests. Further, a sentence of 322
16 months, which is at the low-end of the Guidelines range, is
17 necessary to reflect the seriousness of the offense, promote
18 respect for the law and provide just punishment for the offense,
19 to afford adequate deterrence to criminal conduct, to protect the
20 public from further crimes of the defendant, and to avoid
21 unwarranted sentence disparities. The fact that Swanson has served
22 not even half of his sentence, even assuming he will receive all
23 good-time credits allowed, weighs heavily against authorizing his
24 release. Accordingly, the court concludes that a reduction in
25 sentence is not appropriate.

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28 ³ As of the date of this order, Leavenworth has eleven positive COVID-19 cases out of 411 inmates who had been tested. See <https://www.bop.gov/coronavirus/> (last accessed Aug. 19, 2020).

1 Conclusion

2 In accordance with the foregoing, Swanson's motion for
3 compassionate release (ECF No. 209) is hereby DENIED.

4 IT IS SO ORDERED.

5 DATED: This 19th day of August, 2020.

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8 UNITED STATES DISTRICT JUDGE

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